Supreme Court, U.S.
FILED
OCT 5 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-444

In The

Supreme Court of the United States

October Term, 1988

ROBERT W. LOTT,

Petitioner,

vs.

FIREMEN AND POLICEMEN'S PENSION FUND BOARD OF TRUSTEES OF SAN ANTONIO, TEXAS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

PETITIONER'S REPLY

MAYO J. GALINDO
7718 Broadway
San Antonio, Texas 78209
(512) 828-6777
State Bar No. 07580000
Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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ROBERT W. LOTT replies to Respondent's Brief in Opposition to His Petition for Writ of Certiorari to the Supreme Court of Texas.

Respondent's answer is predicated largely on the theory that it was incumbent upon Petitioner to plead the specific statute which authorized relief. This concept is a vestige of common law pleading and has been rejected by both Federal and Texas courts.

Rule 8(a)(2), Federal Rules of Civil Procedure simply requires that the pleader allege "a short and plain statement of the claims showing that the pleader is entitled to relief . . . "

Rule 54(c) Federal Rules of Civil Procedure further provides "final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleading."

We believe this rule is tersely stated in *Gins v. Mauser Plumbing Supply Company*, 148 F.2d 974 (CA 2d, 1945):

> A simple statement in sequence of the events which have transpired, coupled with a direct claim by way of demand for judgment of what the plaintiff expects and hopes to recover, is a measure of clarity and safety; and even the demand for judgment loses its restrictive nature when the parties are at issue, for particular legal theories of counsel yield to the court's duty to grant the relief to which the prevailing party is entitled, whether demanded or not.

See also the authorities in Section 1219, Wright & Miller, Federal Practice and Procedure, Syllabus 51, 52.

Texas follows the Federal Rule and does not require the specific pleading of a statute upon which relief can be granted. *Chicago R. I. & G. Ry. Co. v. DeBord*, 192 S.W. 767, 769 (Tex. 1917):

> It is not necessary to plead the law, but when the pleading is sufficient to admit the evidence, upon its introduction, the duty of the court arises to apply the law.

In *Bellefonte Underwriters Ins. Co. v. Brown*, 663 S.W.2d 562 (Tex. App. – 14 Dist. 1983), affirmed in part and

reversed in part at 704 S.W.2d 742 (Tex. 1986), the court stated:

> Texas law unquestionably holds that a plaintiff need only plead facts which, if true, entitle him to the relief sought. Texas does not require a plaintiff to specifically plead case authority or statutes to receive that relief. See Colbert v. Dallas Joint Stock Land Bank, 129 Tex. 235, 102 S.W.2d 1031, 1033 (1937).
>
> Moreover, pleading an incorrect or inapplicable theory or statute, as was done here, does not preclude an award. *National Bank v. Texas Investment Co.*, 74 Tex. 421, 12 S.W. 101, 103 (1889).

In the case at bar the trial court specifically found that Article 6252-4a of the Texas Statutes affords Petitioner a separate, independent ground of recovery and this was sufficient under Texas law.

The judgment of the Texas appellate courts that Petitioner's suit was one to enforce the provisions of federal law is dispelled by the Petitioner's Amended Petition, Federal and Texas substantive law.

We pray as in our original application for certiorari.

Respectfully submitted,

MAYO J. GALINDO
7718 Broadway
San Antonio, Texas 78209
(512) 828-6777
State Bar No. 07580000

Attorney for Petitioner